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No. 90-408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF YAKIMA, and DALE A. GRAY,
YAKIMA COUNTY TREASURER,
Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE WASHINGTON STATE ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*

The Washington State Association of Counties (WSAC) is the organization representing county governments in the State of Washington. Through its membership, urban, suburban and rural counties join together for effecitve and responsible county government. The organization has the following goals: to improve county government, to serve as spokesman throughout

the state for county governments; and to achieve public understanding of the role of counties in the state and federal systems of government.[1]

In twenty-six states the Bureau of Indian Affairs has jurisdiction over more than 1000 acres of reservation or trust lands. In these states alone, the total acreage of such land exceeded 53 million acres in 1985, an area larger than all New England and the eastern third of New York State. No known figures exist on the portion consisting of Indian-owned fee lands. Data does, however, exist upon the number of Indian and non-Indian residents of these lands.[2] Approximately 930,000 persons, including some 380,000 non-Indians lived on these lands in 1980. County members of WSAC are the instruments of state government responsible for continued taxation of these lands in the state of Washington for the benefit of all taxing districts, and are in turn primarily dependent upon such taxes upon real property for the revenue with which to perform these and all other governmental functions. WSAC submits this brief to give the Court a broader presentation of the widespread impact of the Court of Appeals' decision than raised by the litigants themselves.

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The Consent to the filing of this brief has been filed with this Court.

[2] Appendix A contains information on the Reservation and Trust Lands in the States where lands subject to Bureau of Indian Affairs jurisdiction exceeds 1000 acres. Land data are extracted from *Lands Under Jurisdiction of Bureau of Indian Affairs as of September 30, 1985*, pp. 2-3, Annual Report of the U.S. Department of Interior (1986); population data are extracted from General Population Characteristics. United States Summary, 1980 Census of Population, Table 71, *General Characteristics for American Indian Persons on Reservations and Alaska Native Villages*, pp. 1-301 through 1-303.

STATEMENT

Amicus Curiae, Washington State Association of Counties, adopts the statement of the case filed by Yakima County, et al., in the Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The Washington State Association of Counties believes the Writ of Certiorari filed by Yakima County should be granted for the following reasons:

I. THE TAX STATUS OF MILLIONS OF ACRES OF FEE LAND IS THROWN INTO DOUBT BY THE OPINION BELOW, UNSETTLING CONSISTENT PRACTICE AND EXPRESSED AUTHORITY OF CONGRESS SINCE 1906.

The Circuit Court opinion would require that even state taxation of fee allotments expressly authorized under 25 U.S.C. § 349 by Congress suffer the case-by-case analysis extracted from one of the opinions in *Brendale v. Confederated Tribes*, 492 U.S. ——, 109 S.Ct. 2994 (1989) (involving zoning issues about which this Court determined Congress had not spoken,) to decide whether taxation would ". . . imperil the political integrity, economic security or the health and welfare of the tribe." *Confederated Tribes v. County of Yakima*, 903 F.2d 1207 (1990) at 1218. It is unclear whether that analysis would turn in part on the extent to which the Tribe had excluded non-Indians from its reservation, as it did in *Brendale*, 109 S.Ct. at 3014-3015. The use of *Brendale* adopted by the Court of Appeals was not suggested by either of the parties. Neither party relied upon *Brendale* in oral argument, and the United States did not mention *Brendale* in its *Amicus Curiae* Rehearing Brief.

Though the Ninth Circuit's opinion applied only to specific parcels of real property in one county, it will, if certiorari is denied, render uncertain the continued tax-

ability of virtually all formerly allotted fee lands throughout the United States, upon which state and county governments have depended since taxation and state law were expressly made applicable to those lands by 25 U.S.C. § 349.

Also, if courts must, as the Ninth Circuit required here in the field of taxation of real property, balance impacts upon tribes of state action expressly authorized by Congress, every other form of expressly authorized state action, and every other form of expressly authorized federal action will be imperiled.

If the opinion of the Ninth Circuit stands, the continued taxability of the fee-owned lands of the approximately 550,000 Indian residents of reservations in state having significant Indian reservations would be rendered uncertain until completion of litigation to decide the effect of the "*Brendale* test." Litigation could be repeated as circumstances change leaving the tax base always uncertain.

By granting certiorari here, this Court has the opportunity to confirm both the explicit direction of Congress and over eighty years of settled practice in Indian taxation. To deny certiorari in this case will introduce uncertainty into one of the few areas where there has been clarity, and will promote endless litigation where there has been the order of law.

II. AVOIDANCE OF "CHECKERBOARD JURISDICTION" IS NOT A RULE OF LAW AND SHOULD NOT BE APPLIED IN REAL PROPERTY TAXATION, WHERE IT WOULD CREATE, RATHER THAN REDUCE CONFUSION.

The Ninth Circuit's application of the "*Brendale* test" to taxation of real property to avoid effects of "checkerboard jurisdiction," would instead create a horrendous cloud of uncertainty; the antithesis of previous opinions of this Court that sought to minimize the effects of

"checkerboard jurisdiction" to avoid just such uncertainty. This Court's doubt about the desirability of "checkerboard jurisdiction" promotes sensible government; but that doubt is not a rule of law to be invoked when it will result in chaos.

This Court first expressed concern about the effect of "checkerboard jurisdiction" some thirty years ago in another case arising in the state of Washington. Paul Seymour, a young Indian, was tried and convicted of burglary in the Superior Court of Washington for Okanogan County for entry into a house in the portion of the City of Omak that lies within the external boundaries of the Reservation of the Colville Confederated Tribes. Mr. Seymour was released upon a Writ of Habeas Corpus when this Court decided that Okanogan County Superior Court did not have jurisdiction over the offense, because it took place in Indian country.

The nub of this Court's reasoning was as follows:

> [When] the existence or nonexistence of Federal jurisdiction depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to *search tract books* in order to determine whether criminal jurisdiction over each particular offense, though committed within the reservation, is in the State or Federal government. [Footnote omitted]
>
> Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of [18 U.S.C.] Section 1151 and we see no justification for adopting an unwarranted construction of that language where the result would merely be to recreate confusion Congress specifically sought to avoid. [Emphasis supplied.]

Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 at 358 (1961). The Court of Appeals' attempt here to apply that rule, not only fails to

avoid the confusion that the rule was designed to avoid, it compounds confusion.

Whether on or off an Indian reservation, it is the *duty* of taxing officials to "search tract books." Determination of taxability and of taxable value requires that each tax parcel be evaluated separately and deliberately. Separate analysis of each parcel of property for each type of tax, such as ad valorem and real estate excise tax, is the norm.

If the Ninth Circuit decision, applying *Brendale* in tax cases involving real property is not corrected, the confusion, eschewed by the Court in the context of on-site arrest and prosecution of felonies in *Seymour*, will be increased many times for state and local jurisdictions. Besides carrying out the normal duties of a tax assessor or treasurer, such as visiting and evaluating the property and examining the nature of its title, local authorities will now have to decide the tribal enrollment status of the owner of every piece of fee land in every reservation. They will then have to litigate or make a very subjective judgment whether continued taxation of the particular tract will imperil the political, economic or social welfare of the local Indian tribe, considering the extent to which tribal rights to exclude non-members continue to exist.

In short, the Ninth Circuit's application of *Brendale*, in an attempt to minimize confusion caused by checkerboard jurisdiction, would instead exacerbate uncertainty.

III. THE UNCERTAINTY OF REAL PROPERTY TAX STATUS WILL RENDER THE BUDGET PROCESS OF STATES AND POLITICAL SUBDIVISIONS UNMANAGEABLE.

The levies of tax by each political subdivision of the state must be spread equally over all taxable property within each taxing district. Wash. Rev. Code § 84.52.040. On or before the 30th of November of each year, the

budgets and amounts and rates of tax to be levied for the next year for all political subdivisions of the state must be certified to the county assessor. Wash. Rev. Code § 84.52.070. Similar procedures for determination and application of real property tax levies apply in almost every state.

If the decision of the Court of Appeals is allowed to stand, there exists a large potential for case-by-case litigation declaring some fee lands free of formerly authorized taxation. Thus, municipalities or states that contain Indian reservations will not know, at the time of certifying budgets and setting levy rates, whether the budgets should be spread over formerly allotted fee lands owned by Indians within their borders.

In addition states, and municipalities will not be able to anticipate the level of revenue upon which they can plan, because taxability will depend on the whimsical nature of private real estate transactions from year to year. There is no way to predict who will convey to whom; Indians to non-Indians or vice versa. Since tribal membership of owners could not be known until the owner comes forward to provide evidence, it is almost certain that it will be several years after taxes are levied, and after funds are obligated, in reliance upon the security of the land, that counties will learn many of the clamied exemption. Any real property later determined to be free of state and local taxation will be identified only long after all services for which it was levied have been provided, and long after the opportunity to spread the loss over the rest of the taxable property.

In most state and local jurisdictions the effects of litigation attempting to apply a *Brendable* standard to real property taxation would be immediate, continuing and serious to their ability to serve critical needs both on and off reservations. In political subdivisions of the State of Washington consisting largely of Indian reservations

and Indian populations, most of the tax base upon which service by political subdivisions to the population has been dependent would be eliminated, placing those services to both Indian and non-Indian citizens in jeopardy.

IV. INACTION WOULD UNFAIRLY DEPRIVE STATE AND LOCAL GOVERNMENTS OF A PRIMARY SOURCE OF REVENUE AVAILABLE FOR PROVISION OF GOVERNMENT SERVICES TO FEE OWNED LAND.

State and local government are required by law to perform government services on reservations and must be assured of a predictable source of revenue to carry out these functions. They provide a variety of services to both Indians and non-Indians within the external boundaries of reservations. These services include education, criminal justice, public works (roads, bridges, facilities) and social welfare.

Real estate taxes constitute a major source of revenue for these services. In the state of Washington, these taxes are the primary source of revenue for political subdivisions. The total amount of property tax that can be collected by any political subdivision without a supermajority vote is constitutionally limited to 1% of the property value, to prevent collection of an unfair amount from parcels taxed. WASH. CONST. art. VII, § 2. Because the need for governmental services is rapidly rising, the effect of constitutional and statutory limitations is that most jurisdictions in Washington are already taxing at the maximum rate allowed by law. They cannot assign more tax to remaining property, if the property tax base is decreased, even if their duties remain constant or grow.

The Ninth Circuit opinion will deprive many state and local governments of significant portions of the revenue derived from real estate taxation of allotted land on Indian reservations. Aside from the fact that Congress has

clearly stated that this land is taxable, the withdrawal of these revenues from local coffers would be fundamentally unfair because local government must still provide services. If Tribal or Federal governments were able and willing to take over all these services, the situation might be different, but they are not.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari filed by Yakima County should be granted.

Respectfully submitted,

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APPENDIX

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States Where Bureau of Indian Affairs Jurisdiction Exceeds 1000 Acres (as of September 30, 1985)

State	BIA Jurisdiction Acreage	Total Persons Residing	Total Indians Residing	% Indians
Alaska	970,872	1,195	952	80%
Arizona	20,110,294	167,875	148,996	89%
California	569,152	39,684	11,305	29%
Colorado	788,407	6,877	1,966	29%
Connecticut	1,201	62	27	44%
Florida	154,173	3,593	1,091	30%
Idaho	824,009	28,541	5,475	19%
Iowa	4,169	5,968	1,767	20%
Kansas	29,998	1,672	716	43%
Maine	212,699	1,430	1,235	86%
Michigan	21,656	26,842	1,587	6%
Minnesota	765,370	25,166	9,648	33%
Mississippi	17,926	2,866	2,766	96%
Montana	4,210,947	49,564	23,598	48%
N. Carolina	56,573	5,717	4,844	85%
N. Dakota	852,366	35,603	16,422	46%
Nebraska	64,858	9,153	2,864	31%
New Mexico	8,018,615	158,510	136,463	86%
Nevada	1,228,726	5,682	4,780	84%
Oklahoma	1,112,805	39,327	4,749	12%
Oregon	769,044	5,602	3,536	64%
S. Dakota	5,082,737	54,219	30,769	57%
Utah	2,320,044	128,077	107,332	83%
Washington	2,556,886	79,046	10,440	21%
Wisconsin	417,912	24,259	9,591	40%
Wyoming	1,888,558	23,157	4,150	18%
TOTAL	53,049,997	930,187	553,058	59%

STATUTORY PROVISIONS

25 USC § 349. Patents in fee to allottees

That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act [25 USC § 348], then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: And provided further, That the provisions of this Act shall not extend to any Indians in the Indian Territory.

(Feb. 8, 1887, ch 119, § 6, 24 Stat. 390; May 8, 1906, ch 2348, 34 Stat. 182.)

18 USC § 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(June 25, 1948, ch 645, § 1, 62 Stat. 757; May 24, 1949, ch 139, § 25, 63 Stat. 94.)

Wash. Const. art. VII § 2 Limitation on Levies. Except as hereinafter provided and notwithstanding any other provision of this Constitution, the aggregate of all tax levies upon real and personal property by the state and all taxing districts now existing or hereafter created, shall not in any year exceed one per centum of the true and fair value of such property in money: *Provided, however*, That nothing herein shall prevent levies at the rates now provided by law by or for any port or public utility district. The term "taxing district" for the purposes of this section shall mean any political subdivision, municipal corporation, district, or other governmental agency authorized by law to levy, or have levied for it, ad valorem taxes on property, other than a port or public utility district. Such aggregate limitation or any specific limitation imposed by law in conformity therewith may be exceeded only

(a) By any taxing district when specifically authorized so to do by a majority of at least three-fifths of the electors thereof voting on the proposition to levy such additional tax submitted not more than twelve months prior to the date on which the proposed levy is to be made and not oftener than twice in such twelve month period, either at a special election or at the regular election of such taxing district, at which election the number of persons voting "yes" on the proposition shall constitute three-fifths of a number equal to forty per centum of the total votes cast in such taxing district at the last preceding general election when the number of electors voting on the proposition does not exceed forty per centum of the total votes cast in such taxing district in the last preceding general election; or by a majority of at least three-fifths of the electors thereof voting on the proposition to levy when the number of electors voting on the proposition exceeds forty percentum of the total votes cast in such taxing district in the last preceding general election: *Provided*, That notwithstanding any other provision of this Constitution, any proposition pursuant to this subsection to levy additional tax for the support of the common schools may provide such support for a two year period and any proposition to levy an additional tax to support the construction, modernization, or remodelling of school facilities may provide such support for a period not exceeding six years;

(b) By any taxing district otherwise authorized by law to issue general obligation bonds for capital purposes, for the sole purpose of making the required payments of principal and interest on general obligation bonds issued solely for capital purposes, other than the replacement of equipment, when authorized so to do by majority of at least three-fifths of the electors thereof voting on the proposition to issue such bonds and to pay the principal and interest thereon by an annual tax levy in excess of the limitation herein provided during the term of such bonds, submitted not oftener than twice in any calendar year, at an election held in the manner provided by law for bond elections in such taxing district, at which election the total number of persons voting on the proposition shall constitute not less than forty per centum of the total number of votes cast in such taxing district at the last preceding general election: *Provided*, That any such taxing district shall have the right to vote of its governing body to refund any general obligation bonds of said district issued for capital purposes only, and to provide for the interest thereon and amortization thereof by annual levies in excess of the tax limitation provided for herein, *And provided further*, That the provisions of this section shall also be subject to the limitations contained in Article VIII, Section 6, of this Constitution;

(c) By the state or any taxing district for the purpose of paying the principal or interest on general obligation bonds outstanding on December 6, 1934; or for the purpose of preventing the impairment of the obligation of a contract when ordered so to do by a court of last resort.

Wash. Rev. Code (1989) § 84.52.040 Levies to be made on assessed valuation. Whenever any taxing district or the officers thereof shall, pursuant to any provision of law or of its charter or ordinances, levy any tax, the assessed value of the property of such taxing district shall be taken and considered as the taxable value upon which such levy shall be made. [1961 c 15 § 84.52.040. Prior: 1919 c 142 § 3; RRS § 11228.]

Wash. Rev. Code (1989) § 84.52.070 Certification of levies to assessor. It shall be the duty of the county legislative authority of each county, on or before the thirtieth day of November in each year, to certify to the county assessor of the county the amound of taxes levied upon the property in the county for county purposes, and the respective amounts of taxes levied by the board for each taxing district, within or coextensive with the county, for district purposes, and it shall be the duty of city councils of cities of the first class having a population of three hundred thousand or more, and of city councils of cities of the fourth class, or towns, and of all officials or boards of taxing districts within or coextensive with the county, authorized by law to levy taxes directly and not through the county legislative authority, on or before the thirtieth day of November in each year, to certify to the county assessor of the county the amount of taxes levied upon the property within the city or district for city or district purposes. If a levy amount is not certified to the county assessor by the thirtieth day of November, the county assessor shall use no more than the certified levy amount for the previous year for the taxing district: *Provided*, That this shall not apply to the state levy or when the assessor has not certified assessed values as required by RCW 84.48.130 at least twelve working days prior to November 30th. [1988 c 222 § 28; 1961 c 15 § 84.52.070. Prior: 1925 ex.s. c 130 § 78; RRS § 11239; prior: 1890 p 558 §§ 77, 78; Code 1881 § 2881.]